Filed 7/24/12 In re M.H. CA2/4

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

In re M.H., A Person Coming Under the Juvenile Court Law.	B236841 (Los Angeles County Super. Ct. No. CK83762)
LOS ANGELES COUNTY DEPARTMENT OF CHILDREN AND FAMILY SERVICES, Plaintiff and Respondent, v. M.K., Defendant and Appellant.	

APPEAL from orders of the Superior Court of Los Angeles County, Amy Pellman, Judge. Affirmed.

Judy Weissberg-Ortiz, under appointment by the Court of Appeal, for Defendant and Appellant.

John F. Krattli, Acting County Counsel, James M. Owens, Assistant County Counsel, and Travey F. Dodds, Deputy County Counsel, for Plaintiff and Respondent.

Appellant M.K. (Mother) is the mother of M.H. (M.), a boy, currently eight years old. Mother appeals the juvenile court's orders terminating parental rights and summarily denying her last-minute petition for modification. Finding no error, we affirm.

FACTUAL AND PROCEDURAL BACKGROUND

A. *Prior Appeal*

The Department of Children and Family Services (DCFS) became involved with the family in April 2009, when Mother threatened to kill a four-year old classmate of M., who was then five. M. was detained and DCFS filed a Welfare and Institutions Code section 300 petition, alleging that Mother's mental and emotional instability rendered her unable to care for M.[1] In June 2009, before the petition could be adjudicated, the parties entered into a mediated agreement under which the petition was amended to state that Mother's "overly protective behaviors" placed M. "in danger of emotional harm." The court found the allegation true under section 360, subdivision (b), which permits the court, if it "finds that the child is a person described by Section 300," to order, "without adjudicating the child a dependent child of the court, . . . that services be provided to keep the family together and place the child and the child's parent or guardian under the supervision of the social worker . . . ." The court returned M. to Mother under DCFS supervision and ordered her to participate in individual counseling and an anger management program.

Although Mother had agreed to the language of the petition and to the essential components of the disposition, she filed an appeal seeking to "cancel the

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[1] Undesignated statutory references are to the Welfare and Institutions Code.

decision made by [the] Judge."[2] In addition, she failed to comply with the mediated agreement: she obstructed the caseworker's access to M. by refusing to answer the door when the caseworker came to her apartment, participated only briefly in parenting and anger management programs, and refused to undergo individual counseling or even to speak to a psychologist when the caseworker attempted to introduce her to one. Based on Mother's refusal to allow access to M., in July 2009, DCFS re-detained M. and placed the child in foster care. In August, DCFS filed an amended petition based on Mother's noncooperation. The court found the revised allegation true and ordered M. placed back with Mother under continued DCFS supervision. Before that order could be implemented, however, the foster mother noticed unusual bruising on M.'s legs. M. reported that Mother had "flicked" his legs with her fingers, and that during an unmonitored visit, Mother had left him alone in a fast food restaurant while she went next door to buy him a band-aid.

DCFS filed a subsequent petition. At the October and November 2009 jurisdictional hearing, the court found true that Mother had "used inappropriate physical discipline, by flicking the child's legs with her hand[,] and inflicting bruises" and that she had placed M. in a "detrimental and endangering situation" by leaving him in a restaurant without adult supervision. For disposition, the court ordered Mother to undergo a psychological examination and to participate in individual counseling.[3] Mother appealed the jurisdictional and dispositional orders. By opinion dated September 15, 2010, we affirmed the court's orders.

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[2] Mother did not prosecute the appeal, which was subsequently dismissed.

[3] Mother testified at the hearing that she was willing to cooperate with DCFS and to participate in services. After the hearing, she was heard to say: "'Where is my lawyer? I want everything cancelled, cancel[] everything.'"

B. *Review Hearings*

In May 2010, while the appeal was pending, the court held the six-month review hearing. The caseworker reported that Mother had refused to undergo a psychological evaluation or to participate in individual counseling. Mother had also refused to visit M. between January through March 2010 because she did not approve of the foster parents' race. Team decision meetings were held in January, March and April to advise Mother what she needed to do to regain custody. At one such meeting, Mother had an angry outburst when the need for a psychological evaluation was brought up. During this period, Mother accused the caseworker of conspiring against her and generally refused to take the caseworker's calls. M. was described as doing well in foster care. He had become toilet trained and had begun dressing himself, brushing his teeth, combing his hair, and organizing his room. M. stated that he was happy in the foster home, but missed Mother and enjoyed seeing her. During visits, Mother was observed feeding M., helping him in the bathroom, and scrubbing his face and hands, although he was capable of doing those things himself. Because Mother had completed parenting and anger management classes, the court found that she had made "moderate but incomplete" progress toward alleviating the causes of detention and continued reunification services for an additional six months.

The 12-month hearing was held in January 2011. The caseworker reported that Mother was visiting M. weekly. During the visits, Mother and M. said "I love you" and "I miss you" to each other. M. said he enjoyed the visits and looked forward to seeing Mother and wanted to live with Mother. The monitor described their bond as "strong," but noticed that M. appeared reserved and quiet around Mother. Mother occasionally "doz[ed] off" during the visits and occasionally walked away from M. without saying anything to the monitor, causing the monitor to wonder if Mother could be trusted to stay with M. during an unmonitored visit.

In addition, Mother continued to treat M. as if he were younger and less capable than he was, ordering food for him without asking what he would like to eat or drink, feeding him, insisting that he eat everything she bought for him, carrying him, and reading him the same book over and over. She sometimes interrogated M. about the foster home, putting him in an uncomfortable position. M. spent a lot of the visitation time playing alone and entertaining himself.

Mother continued to refuse to undergo counseling or a psychological evaluation. She stated she did not believe in counseling because it was "satanic" and against her Christian beliefs. Even bringing up the subject caused her to become angry and upset. DCFS recommended that the court order six more months of services and give DCFS discretion to liberalize visitation. The court warned Mother that if she did not undergo counseling, M. would not be returned, and gave DCFS permission to liberalize visitation if Mother began participating and making progress in counseling.

Prior to the 18-month review hearing, the caseworker reported that M. had begun to call his foster mother "Mom." He had stopped saying he wanted to return to Mother and instead stated he wanted Mother to live with him in the foster home. During visitation, he no longer appeared comfortable around Mother. She continued to feed him and offer to carry him as if he were a younger child. There was no evidence that Mother had undergone any individual counseling as she refused to communicate with the caseworker about this topic. DCFS recommended that reunification services be terminated. At the April 6, 2011 review hearing, Mother's counsel reported that she had begun counseling. However, Mother informed the court that she could not undergo counseling. Because of this discrepancy and because Mother appeared to be having trouble communicating through the translator, the court ordered a mediation to ensure that Mother understood the case plan.

Prior to the mediation, the caseworker learned that Mother had spoken on three occasions with Dr. Donald Mortenson, the pastor for a local church who held a degree in counseling but was unlicensed. After three sessions, she refused to see him anymore or to accept his referral to a licensed counselor. Dr. Mortenson expressed the opinion that Mother feared being diagnosed with a mental illness. Mother had said to the caseworker: "'If I am that crazy to receive counseling, I should not be a mother to the child.'" At the mediation held on April 20, Mother asked that the individual counseling requirement be eliminated.

At the continued 18-month review hearing held on April 29, 2011, Mother testified that she had stopped attending counseling with Dr. Mortenson because of a language barrier and cultural differences. She stated she could not participate further in counseling because "God said 'no.'" She also stated that she "tried [counseling] many times," but that the people she talked to believed the caseworker rather than her, which made her uncomfortable. The court concluded that Mother had not made sufficient progress, terminated reunification services, and set a section 366.26 hearing to consider termination of parental rights.

Between April 2011 and October 2011, Mother visited M. only three times. During the visits, she continued to buy food for him without his input and to feed him rather than letting him eat independently. She tried to help him with his homework and got loud and impatient if he did not answer quickly enough. M. did not communicate or interact with Mother very much. M. stated that Mother embarrassed him and made him feel uncomfortable. However, he continued to hug her and tell her he loved her at the end of the visits. The caseworker discussed the prospect of adoption with M. At first he stated he wanted to live in the foster home, but still see Mother. The second time the caseworker brought up the topic, he stated that he wanted to be adopted by his foster parents. The foster parents, with whom M. had lived since 2009, had consistently expressed their desire to

adopt him if reunification efforts failed. DCFS recommended termination of parental rights and adoption as the permanent plan.

On October 11, 2011, the day of the section 366.26 hearing, Mother filed a section 388 petition. The petition stated that Mother had "made a commitment to pursue individual counseling or whatever program the Court deem[ed] appropriate," but had found that it was too expensive. The petition asked for reinstatement of reunification services so that Mother could access low cost or no cost services. At the same time, she asked that the court "amend the case plan to exclude individual counseling." The court summarily denied the petition on the ground it did not "state new evidence or a change of circumstances."

At the section 366.26 hearing, M. testified that he would like to continue to see Mother and would be sad if he could not see her anymore. When asked if he wanted to be adopted, he initially stated "I don't know" and subsequently said "yes," explaining that he liked his foster mother and wanted to live with her. Counsel stipulated that if Mother testified, she would say that visiting M. required her to undertake a six-hour round trip. During visits, she read to M., helped him with his homework, fed him, and played with him. She also provided him with clothing. M. was excited to see her, greeted her with a big smile, and stated that he loved her and wanted to go home with her. When the visits were over, M. did not want to leave. Counsel for Mother argued that she and M. had a beneficial relationship and that severing the parental bond would harm M. Counsel for M. joined DCFS's counsel in arguing that parental rights should be terminated and M. freed for adoption. The court terminated parental rights, finding that although Mother and M. loved each other, their visits had not been regular or positive, that the relationship was not so strong that it would be detrimental to M. to sever it, and that the benefits of continuing the parent/child relationship did not outweigh the benefits to M. of obtaining a stable, permanent home. Mother appealed.

DISCUSSION

A. *Summary Denial of Petition for Modification*

"Section 388 permits '[a]ny parent or other person having an interest in a child who is a dependent child of the juvenile court' to petition 'for a hearing to change, modify, or set aside any order of court previously made or to terminate the jurisdiction of the court' on grounds of 'change of circumstance or new evidence.' (§ 388, subd. (a).) 'If it appears that the best interests of the child may be promoted by the proposed change of order, . . . the court shall order that a hearing be held . . . .' (*Id.*, subd. (c) [now subdivision (d)].) Section 388 thus gives the court two choices: (1) summarily deny the petition or (2) hold a hearing. [Citations.]" (*In re Lesly G.* (2008) 162 Cal.App.4th 904, 912.) "'[I]f the petition fails to state a change of circumstances or new evidence that might require a change of order, the court may deny the application ex parte. [Citation.]'" (*Ibid.*, quoting *In re Jamika W.* (1997) 54 Cal.App.4th 1446, 1450.)

"In order to avoid summary denial, the petitioner must make a 'prima facie' showing of 'facts which will sustain a favorable decision if the evidence submitted in support of the allegations by the petitioner is credited.'" (*In re Lesly G.*, *supra*, 162 Cal.App.4th at p. 912, quoting *In re Edward H.* (1996) 43 Cal.App.4th 584, 593; see Rules of Court, rule 5.570(d)(1).) "'There are two parts to the prima facie showing: The parent must demonstrate (1) a genuine change of circumstances or new evidence, and . . . (2) [that] revoking the previous order would be in the best interests of the [child]. [Citation.]'" (*In re C.J.W.* (2007) 157 Cal.App.4th 1075, 1079, quoting *In re Anthony W.* (2001) 87 Cal.App.4th 246, 250.) As "the essence of a section 388 motion is that there has been a change of circumstances," the court should consider "the nature of the change, the ease by which the change could be brought about, and the reason the change was not made before . . . ." (*In re Kimberly F.* (1997) 56 Cal.App.4th 519, 531.) An appellate court reviews the

juvenile court's summary denial of a section 388 petition for abuse of discretion. (*In re C.J.W.*, *supra*, at p. 1079.)

Mother contends the petition established a prima facie case to sustain a favorable determination, triggering the right to a full hearing on her section 388 petition. We disagree. The petition did not demonstrate a genuine change in circumstances. Mother stated that she was ready to begin counseling, but she had made that promise multiple times before. The first occasion was in June 2009, when she agreed, after mediation, to a disposition that included individual counseling. She failed to undergo any counseling at that time and for a period of time sought to overturn that disposition on appeal. The second occasion was at the detention hearing on the August 2009 supplemental petition, when she agreed to cooperate with DCFS and to participate in services. Immediately thereafter, she sought to "'cancel[] everything.'" Mother made no subsequent effort to undergo individual counseling until the eve of the 18-month review hearing, when she was seen briefly by Dr. Mortensen. However, after three sessions, she refused to continue with him or to accept his referral to a licensed therapist. Mother's section 388 petition contained nothing to indicate that this time she was sincere and would follow through with her promise. To the contrary, the request that the reunification plan be amended to *delete* the requirement for individual counseling demonstrated that Mother continued to believe she had no psychological problems that needed addressing before she could be trusted with M.'s care.

Moreover, even if the court found true that Mother sincerely desired to deal with the psychological issues that led to M.'s detention, a petition filed at the last minute must do more than indicate that the offending parent is ready to begin the process of reunification. By the time of the section 366.26 hearing, the court's focus must shift from the parents' rights to custody of and authority over their children to "the needs of the child for permanency and stability." (*In re Marilyn H.*

(1993) 5 Cal.4th 295, 309.) "Childhood does not wait for the parent to become adequate. [Citation.]" (*Id*. at p. 310; see *Cresse S. v. Superior Court* (1996) 50 Cal.App.4th 947, 954-955 [parent's "flurry of activity on the eve of" the 18-month review hearing, where she had failed in every respect until then to comply with the reunification plan, did not require court to extend reunification services or delay section 366.26 permanent planning hearing].) DCFS first began working with Mother in April 2009. She was provided several months of services before M. was detained and was subsequently given more than 18 months to complete the reunification program. Even if Mother's word could be trusted, her petition established at best that she was ready to begin the process of reunification. "A petition which alleges merely changing circumstances and would mean delaying the selection of a permanent home for a child to see if a parent, who has repeatedly failed to reunify with the child, might be able to reunify at some future point, does not promote stability for the child or the child's best interests." (*In re Casey D.* (1999) 70 Cal.App.4th 38, 47.) The court's conclusion that Mother's section 388 petition did not establish a prima facie case that a change of its prior orders would be in M.'s best interests did not represent an abuse of discretion.

B. *Termination of Parental Rights*

Section 366.26, subdivision (c)(1) requires the juvenile court to terminate parental rights and order the dependent child placed for adoption if it finds by clear and convincing evidence that the child is likely to be adopted, unless it finds "a compelling reason for determining that termination would be detrimental to the child" due to the existence of certain specified exceptional circumstances. (See § 366.26, subd. (c)(1)(B).) Once the court determines that a child is likely to be adopted, the burden is on the parent to demonstrate that termination of parental rights would be detrimental to the child under one of the exceptions listed in

section 366.26, subdivision (c)(1). (*In re Lorenzo C.* (1997) 54 Cal.App.4th 1330, 1343-1345.) "Because adoption is more secure and permanent than a legal guardianship or long-term foster care, adoption is the Legislature's first choice for a permanent plan for a dependent minor child who has not been returned to the custody of his or her parents and who is found by the dependency court to be adoptable." (*In re Scott B.* (2010) 188 Cal.App.4th 452, 469.) "[I]t is only in exceptional circumstances that a court will choose a permanent plan other than adoption." (*Ibid.*)

Mother contends the evidence established that the exception contained in section 366.26, subdivision (c)(1)(B)(i) applied. Subdivision (c)(1)(B)(i) provides an exception to terminating parental rights where "[t]he parents have maintained regular visitation and contact with the child and the child would benefit from continuing the relationship." The subdivision (c)(1)(B)(i) exception is established by evidence of a significant, positive emotional attachment of the child to the parent. (*In re Derek W.* (1999) 73 Cal.App.4th 823, 827; *In re Elizabeth M.* (1997) 52 Cal.App.4th 318, 324.) To support a finding of "benefit" under subdivision (c)(1)(B)(i), of section 366.26, the parent-child relationship must do more than confer some "incidental benefit" to the child; it must "promote[] the well-being of the child to such a degree as to outweigh the well-being the child would gain in a permanent home with new, adoptive parents." (*In re Autumn H.* (1994) 27 Cal.App.4th 567, 575.) The parents must not only demonstrate "'frequent and loving contact' [citation], an emotional bond with the child, or that the parents and child find their visits pleasant [citation]"; they "must show that they occupy 'a parental role' in the child's life." (*In re Andrea R.* (1999) 75 Cal.App.4th 1093, 1108-1109, quoting *In re Beatrice M.* (1994) 29 Cal.App.4th 1411, 1418-1419.) Only "[i]f severing the natural parent/child relationship would deprive the child of a substantial, positive emotional attachment such that the child would be greatly

harmed," can the preference for adoption be overcome and parental rights maintained. (*In re Autumn H.*, *supra*, at p. 575.)

The exception to termination of parental rights and adoption "must be examined on a case-by-case basis, taking into account the many variables which affect a parent/child bond. The age of the child, the portion of the child's life spent in the parent's custody, the 'positive' or 'negative' effect of interaction between parent and child, and the child's particular needs are some of the variables which logically affect a parent/child bond." (*In re Autumn H.*, *supra*, 27 Cal.App.4th at pp. 575-576.) We review the court's section 366.26 finding to determine whether substantial evidence supports it, construing the evidence most favorably to the prevailing party and indulging in all legitimate and reasonable inferences to uphold the court's ruling. (*In re Misako R.* (1991) 2 Cal.App.4th 538, 545; but see *In re Jasmine D.* (2000) 78 Cal.App.4th 1339, 1351 [concluding that in reviewing whether parent has established a section 366.26, subdivision (c)(1) exception, "the abuse of discretion standard is in order" because juvenile court "is determining which kind of custody is appropriate for the child," but finding little "practical differences between the two standards of review"].)

Mother contends the court's finding that visits were not regular was not supported by substantial evidence. The evidence established that there were several breaks in Mother's general pattern of weekly visitation, most recently the four-month period between the 18-month review hearing and the section 366.26 hearing when Mother visited M. only three times. Accordingly, the juvenile court's finding was supported. Moreover, even were we to agree that Mother met the first prong of the section 366.26, subdivision (c)(1)(B)(i) exception -- regular visitation -- we would not reverse the juvenile court's decision. Mother and M. were together for the first five years of his life and for a period continued to share a close bond. However, the evidence established that the original bond between

Mother and M. had been weakened by the repeated detentions and the years of separation. M.'s visits with Mother had become less positive and enjoyable for M. as Mother continued to treat M. as if he were still a five-year old, failing to recognize his growing maturity and need for independence. Mother's behavior during the visits had become a source of embarrassment and discomfort for M. The foster family provided a safe, stable and structured home, where M. was thriving. M. had begun to view the foster mother as his "mom" and the foster home as his home. There was no evidence M. would suffer harm from severing the relationship with Mother. This case did not present the exceptional circumstances requiring the court to choose a permanent plan other than adoption.

DISPOSITION

The orders are affirmed.

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MANELLA, J.

We concur:

EPSTEIN, P. J.

SUZUKAWA, J.